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Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada

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This essay examines the transformation of the public–private divide in Canadian law and politics in the context of a little-known set of voluntary initiatives for corporate "greening," which are known as environmental management system (EMS) standards. These standards are developed and applied in the relative obscurity of corporate offices, management consulting firms, and standardization bodies (national and international organizations that write technical standards). They have received little attention from academics and almost none from the popular news media and nongovernmental organizations (NGOs). The standardization bodies that develop them have gone almost entirely unnoticed in the recent wave of controversy and popular protest over globalization and free trade that has swept the major intergovernmental trade and financial institutions. Nonetheless, voluntary EMS initiatives have significant and largely unexplored implications for environmental quality, public health, and the definition of "public" and "private" in Canadian law and politics.

Environmental Management Systems

An EMS is a system of management policies, procedures, structures, and practices that enables an organization to anticipate, identify, and manage the environmental impacts of its activities. The major elements of an EMS include: a written environmental *policy* setting out the organization's environmental vision and basic commitments; a *planning* process to evaluate the organization's environmental impacts, identify the applicable legal requirements, and set environmental objectives and targets; *implementation* of the EMS through roles, responsibilities, resources, training, communication, documentation, and operational controls; the *checking* of the organization's performance through regular monitoring, measurement, and audits along with *corrective action* to remedy any problems; and a regular *management review* to ensure the continuing suitability and effectiveness of the EMS. This ongoing cycle of planning, implementation, checking, corrective

action, and review (which is also known as the "Plan-Do-Check-Act" or PDCA model) is meant to result in the continual improvement of the EMS and, ultimately, the organization's environmental performance.

While many other voluntary environmental initiatives set environmental performance goals for organizations to meet, EMSs leave it up to the organization to set its own environmental performance objectives in accordance with its needs and interests. Thus, an EMS is primarily procedural rather than performance oriented. The thinking behind an EMS is that improved management processes will lead to improved environmental outcomes.

EMSs emerged as a distinct management tool in the late 1980s in the wake of several prominent environmental disasters, including the chemical disaster in Bhopal, India. A growing number of industrial firms, many of them large multinational corporations, expanded and consolidated their existing environmental management tools (for example, environmental policies, environmental audits, public environmental reports, and pollution prevention programs) into systematic programs to manage the environmental impacts of their operations. Many of these EMSs were modelled after the "total quality management" systems that had recently swept the business world. By the early 1990s, many firms supported the development of uniform guidelines for EMSs to enable comparability and to create a level playing field for trade. Standardization bodies in several jurisdictions, buoyed by the meteoric rise of the ISO 9000 quality management standards, took up this challenge and began to develop voluntary EMS standards.

The most prominent EMS standardization initiative is the ISO 14000 series of global standards developed by the International Organization for Standardization (ISO). The ISO 14000 series consists of ISO 14001, which specifies requirements for an EMS that may be objectively audited;[1] ISO 14004, which is a more detailed and flexible guide to designing and implementing an EMS;[2] and around twenty other supporting standards related to EMS auditing, life-cycle analysis, ecolabelling, environmental performance evaluation, and other matters. The ISO is a global federation of around 140 national standardization bodies. The main work of the ISO and its member bodies is the development of technical standards by business for business. The ISO 14000 standards are expressly intended to be one of the global business community's major contributions to the global public policy goal of sustainable development and to inaugurate a new paradigm of environmental management that is applicable not only to business firms but to all organizations, from hospitals, to universities, to military bases, to government departments.

Having an EMS in place is only part of the story. Many organizations want to be able to demonstrate to relevant external audiences (for example, customers, competitors, trade associations, consumers, or regulators) that their EMS conforms to a recognized standard, thereby realizing reputational,

competitive, or regulatory benefits or responding to customer demand. This is typically achieved by having the EMS audited and certified as conforming to the ISO 14001 standard by an accredited third-party registrar. Independent third-party certification has long been used to verify conformance to technical product safety or performance standards. In recent years, it has been extended to demonstrate conformance to a broader range of quality, environmental, labour, social, and other criteria. Examples include product ecolabelling programs,[3] sustainable forestry or fisheries management programs,[4] and environmental, quality, or occupational health and safety management system standards, including ISO 14001.

EMSs have become widespread in the private sector in the last ten years, particularly among multinational corporations and corporations operating in international markets. A growing number of multinational corporations require their suppliers to have ISO 14001 EMSs in place. EMS certification is fast becoming a requirement for doing business in a few industry sectors (for example, auto manufacturing), and the number of ISO 14001 certificates worldwide is growing rapidly.[5]

What little scholarship there is about EMS initiatives emphasizes their private and voluntary character. While some writers extol EMSs as evidence of a revolution in corporate environmental practices and an example of the promise of corporate self-regulation,[6] others see EMSs as an example of corporate "greenwash" and a pretense for governments to retreat from environmental regulation.[7] Running through these debates is the theme of the increasing power of private authority in public affairs.[8] This literature makes a contribution to our knowledge by demonstrating that these voluntary initiatives, far from being apolitical, reflect the political agendas and public order conceptions of particular social actors. It also contributes to the burgeoning debates about regulatory "reinvention"[9] and the role that voluntary corporate initiatives should play in public policy.[10]

This tendency to focus on the "privatization" of environmental policy tends, however, to underemphasize an important aspect of the politics of voluntary environmental initiatives, namely, the fact that public authorities and legal systems are deeply involved in the constitution and exercise of "private" authority to the point that it may no longer be useful to discuss these voluntary initiatives in terms of a public–private divide. By emphasizing the voluntary and private character of these environmental initiatives, the debates over EMS initiatives tend not to acknowledge the full extent of the entanglement of public authorities and voluntary initiatives.[11] Numerous writers have addressed certain aspects of this interaction,[12] but very few have attempted to examine it comprehensively.[13] This is also true to a lesser extent of the literature on voluntary environmental intiatives generally.[14] In fact, diverse public authorities around the world have begun to participate in, and influence, the development of voluntary EMS initiatives and

incorporate them into their strategies and programs in an increasing variety of ways, including officially endorsing or encouraging private sector EMS implementation, conducting or disseminating research about EMSs, providing financial incentives for EMS implementation, relaxing regulatory requirements or criminal penalties for companies that implement voluntary EMS standards, making the implementation of voluntary EMS standards mandatory through legislation or court order, applying voluntary EMS standards to their own operations, developing or agreeing to international trade rules that may turn voluntary international standards into constraints on governments' regulatory options, and steering the development and use of voluntary EMS standards in particular directions.

It is at this interface between state and non-state regimes that the most interesting questions about EMS standards and other voluntary initiatives arise. Distinctions between public and private, state and non-state, mandatory and voluntary are not particularly helpful in understanding the significance of EMS standards. Rather, EMS standards demonstrate that the practices of government traverse the categories on which our understandings of law and politics are typically based. I investigate this interface by exploring the forms of public authorities' engagements with voluntary EMS standards in Canada and examining the "governmental" implications of this important experiment in "private" regulation. In the second part of this chapter, I describe the ways in which Canadian public authorities have engaged with voluntary EMS initiatives. In the third part, I explore the implications of these engagements for the (re)definition of the public–private divide in Canadian law and politics. I conclude with some suggestions about the possible role of law in facilitating or resisting these transformations.

Public Authorities' Engagements with Voluntary EMS Initiatives in Canada

A variety of public authorities in Canada have begun to engage with EMSs and voluntary EMS standards in a range of interesting ways. I use the term "public authorities" broadly to denote the entire Canadian state apparatus, including government ministers, departments, agencies, bureaucrats, procurement personnel, regulators, committees, legislatures, prosecutors, courts, administrative tribunals, military facilities, local governments, and public utilities. Their engagements with EMS initiatives to date have fallen, I suggest, into five rough categories: steering, self-discipline, knowledge production, reward, and command. I also identify three other categories of engagement, which have not yet been employed by Canadian public authorities in relation to EMSs but which can be discerned in their engagements with other voluntary initiatives: benchmarking, challenging, and borrowing. Together these eight categories give an indication of the range of Canadian public authorities' engagements with "private" governance in the field of environmental protection.[15]

Modes of Engagement

Steering

First, Canadian public authorities have sometimes engaged with voluntary initiatives such as EMSs and EMS standards in a mode that can be described as "steering," namely encouraging voluntary initiatives, inhibiting them, or steering their development, content, or use in a particular direction. At a certain level, all the modes of engagement that I identify could be described in this way. "Steering" might thus be viewed as an umbrella category covering most public authorities' interactions with voluntary initiatives. Nonetheless, Canadian public authorities have exhibited several types of conduct that are distinct enough from the other categories of engagement to be considered separate. The primary driver for these engagements is, as Pollution Probe observes, that "notwithstanding their voluntary nature, standards are properly regarded by policy makers as an instrument of governance."[16]

Although "steering" often involves active, intentional efforts to mold conduct, it can also be passive or even inadvertent. First, it may include surveillance or intelligence gathering. Government officials may participate in standards development, for instance, as much to observe and stay abreast of industry developments as to push standards in any particular direction.[17] In this case, "steering" consists in patrolling a particular conception of the appropriate boundary between government and "private" spheres. Second, public authorities may inadvertently send signals that influence voluntary initiatives. For instance, governments may, on one hand, publicly encourage firms to use EMSs and environmental certification initiatives but, on the other, maintain regulatory frameworks, such as forest tenure laws or environmental audit disclosure rules, that inadvertently inhibit such use.[18]

In any event, public authorities in Canada have engaged in "steering" voluntary EMS initiatives in at least five ways: by pronouncing official policies on EMSs, by formally constituting and funding standardization bodies, by participating in the development of voluntary EMS standards, by providing strategic policy leadership for standardization activities, and by regulating the development, content, or use of voluntary initiatives.

"Talking the Talk": Official Policy Pronouncements First, some public authorities in Canada and elsewhere have formulated and pronounced official policies on the private sector use of voluntary EMS initiatives. Such pronouncements, which range from off-the-cuff remarks to detailed policy statements, can have important legitimation or delegitimation effects for

voluntary initiatives.[19] Their content varies from enthusiastic (but often vague) endorsement, to active promotion, to the enunciation of conditions or goals for public authorities' involvement or support, to the enumeration of concerns, to active resistance (although this last initiative is very rare in the case of EMS). In Canada, official pronouncements have tended toward endorsement and promotion – "talking the talk" of EMS as part of a broader agenda of regulatory flexibility. Very few Canadian government authorities have initiated serious consultations or issued careful policy pronouncements about how, why, or in what conditions they will endorse voluntary EMS initiatives, but this inaction is changing as some federal and provincial authorities have begun earnest policy development efforts regarding EMS.[20]

Constitution and Funding of Standardization Bodies Second, the federal government is involved in the establishment and operation of voluntary standards-setting bodies in Canada. Although this does not involve the overt direction of standardization activities, it is an interesting but overlooked dimension of interaction between governments and voluntary standardization. Standards-setting bodies in most countries have complicated relationships with the state apparatus. The Standards Council of Canada, which is Canada's principal voluntary standardization organ, and its national ISO member body, is a "quasi-non-governmental organization."[21] It is a federal crown corporation, established by statute in 1970. It reports to parliament through Industry Canada and receives federal government funding.[22] Its statutory mandate is to promote efficient and effective voluntary standardization in Canada by, *inter alia*, promoting public–private sector cooperation.[23] Thus, its constitutive instrument emphasizes the hybrid public–private character of standardization.[24]

Participation in Standards Development Third, Canadian government officials have participated directly in the development of EMS standards in Canada and the ISO since the beginning of EMS standardization in the early 1990s, by sitting on national standards committees and by serving as Canadian delegates to ISO meetings.[25] Indeed, government officials participate in most voluntary standards development in Canada.[26] Canadian standards committees operate on a consensus basis and employ a "balanced matrix" to ensure that their membership reflects a rough balance among standards users (industry), service/professional representatives (including consultants, auditors, and registrars), government officials, and "general interest" members (a grab-bag of consumer, environmental, and labour representatives, academics, and so on).[27] Government officials often cite the balanced membership and consensual process of Canadian standards committees and the ISO itself as key reasons to endorse voluntary EMS standards,[28] but the impression of balanced consensus may be misleading. Industry and consultants usually make up a large majority of the committees, and, thus, the Canadian Standards Association (CSA) often has difficulty maintaining the "balanced matrix" of its environmental standards committees,[29] and the ISO has been criticized repeatedly for its dominance by big industry from advanced industrial countries.

Strategic Policy Leadership Fourth, many governments see strategic leadership of national and international standardization activities as a priority for ensuring international competitiveness of their home industry. It was only in March 2000, however, that the Canadian federal government launched the Canadian Standards Strategy, which serves to "provide direction and leadership on how to use standardization to best advance the social and economic well-being of Canadians in a global economy."[30] The strategy promotes the use of standards as complements to regulation, calls for fuller representation of the broadening range of "standardization stakeholders," and acknowledges that fiscal restraint and global trade are driving public authorities' increasing reliance on voluntary standards to achieve public policy goals.[31]

Regulation of Voluntary Initiatives Finally, public authorities may regulate the development, use, or content of voluntary environmental initiatives. Canadian public authorities have generally taken a "hands off" approach to the development and use of voluntary initiatives,[32] including EMSs. Nonetheless, various forms of state regulation may affect the development and use of EMS initiatives directly or indirectly, including:

- competition law, which addresses the possible anti-competitive effects of competitors coming together to devise rules for themselves;
- misleading advertising laws, which may apply when a firm violates the requirements of a voluntary standard to which it subscribes (for example, ISO 14001) yet represents itself as conforming;
- international trade law, in particular, the Agreement on Technical Barriers to Trade (TBT Agreement), which requires member states, including Canada, to do everything reasonable to ensure that voluntary standards-setting bodies in their jurisdiction adhere to the Code of Good Practice for the Preparation, Adoption and Application of Standards, which essentially applies the TBT Agreement's trade disciplines to voluntary standardization (that is, where international standards exist on a subject, domestic standardization bodies should use them as the basis for their own standards);[33]
- the presence or absence of clear ground rules for the development and use of voluntary initiatives, such as the requirements of public participation in the development or implementation of voluntary initiatives or

the public disclosure of information on participants' performance (to date, Canadian governments have not enacted such rules); and
- the presence or absence of a credible "regulatory backstop" in the form of monitoring and enforcing existing environmental laws and demonstrating a will to step in with regulatory instruments should the voluntary initiatives fail to achieve public policy objectives.[34]

Self-Discipline

The second major way that Canadian public authorities have engaged with voluntary EMS initiatives can best be described as self-discipline.[35] It is possible to distinguish two forms of self-discipline: (1) when public authorities "walk the walk" by implementing EMSs in their own operations, and (2) when public authorities ratify international agreements that turn voluntary standards into potential constraints on their authority.

"Walking the Walk": Implementing EMSs in Government Operations Canadian public authorities at all levels of government have begun to develop and implement their own EMSs, some on their own initiative and others as a result of pressure from central government authorities. At the federal level, most major departments and several agencies now have EMSs, although they vary substantially in scope, detail, and the degree of implementation. The federal auditor general and the commissioner of the environment and sustainable development (CESD) began to encourage federal organizations to implement EMSs in the mid-1990s. Facing mostly desultory responses, they soon turned to prodding and shaming, referring to EMSs as "essential" for government operations and publicly exposing the foot dragging that was happening in several departments.[36] The CESD and Environment Canada play central roles in assisting federal government bodies to develop and implement EMSs and appear to consider EMSs mandatory, at least for the twenty-five major federal departments and agencies that must file sustainable development strategies.[37]

Some provincial and territorial ministries have also begun to implement EMSs, and a substantial and growing number of Canadian municipalities have implemented EMSs either for their entire operations or for subordinate bodies such as water or waste management units. Central provincial government authorities have generally done little to coordinate, encourage, assist, or push these developments. Several interesting issues arise from these self-applications of EMSs in the public sector, including:

- Reasons for implementing EMSs: Although Canadian public authorities list many reasons for implementing EMSs, one looms large – to set an example for the private sector.[38] In reality, however, the leading edge of EMS design and implementation is found in forward-thinking corporations, consulting firms, and standardization bodies, along with innovative public–private consortia outside Canada.[39] Far from leading by example, many Canadian public authorities are simply scrambling to keep up with the private sector.[40]
- Endorsement of ISO standards: Most Canadian public authorities' EMSs are modelled on ISO 14004 or (less often) ISO 14001. The federal government has expressly endorsed ISO 14004 as a guide for public sector EMSs.
- Verification and oversight: Verification of the implementation and performance of public sector EMSs in Canada is haphazard and incomplete. Most government organizations disclose basic information about their EMSs, and some report publicly on their EMS performance. The auditor general and the CESD monitor the federal government's implementation of EMSs (there is typically no such oversight in the provinces). While some Canadian public authorities have obtained third-party certification for certain individual facilities' EMSs, most have avoided certification largely because of the expense involved.
- Variety of settings: Finally, Canadian public authorities have implemented EMSs in a wide variety of organizational settings, from entire government departments to individual branches, agencies, operating units, facilities, or even single buildings. They have been applied in a range of fields including environmental regulation, food inspection, transportation, electricity generation, water and waste management, military supply, forestry operations, and other resource activities.

Voluntary Standards as Self-Imposed Constraints on Public Authority Canada is a party to certain international trade agreements that may transform voluntary international standards developed by obscure, often industry-dominated standardization bodies, such as the ISO, into potential constraints on Canadian governments' freedom to set their own legal standards for health, safety, and the environment. Under the 1994 TBT Agreement, member states must base their domestic "technical regulations" (that is, environmental and other regulations governing products or their related processes or production methods) on existing voluntary standards developed by international standardization bodies such as the ISO unless the standards would be "an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."[41] Under these rules, regulations that are based on existing international standards are presumed not to create an illegal obstacle to trade, but regulations that deviate from international standards may be, and have been, challenged as trade barriers.[42]

Although the full measure of these trade disciplines has yet to be taken, they clearly have potential implications for public authorities' engagements with voluntary environmental initiatives. When public authorities begin to promulgate mandatory regulations on matters covered by voluntary standards, such as when Nova Scotia and New Brunswick made ISO 14000-based EMSs mandatory in the gas pipeline industry,[43] those standards may limit governments' authority to design their own regulations.[44] Ironically, therefore, EMS standards, which are almost universally identified with regulatory flexibility, may ultimately impose a constraint on such flexibility.

Knowledge Production

The third mode of engagement has as its defining feature the generation and dissemination of knowledge about voluntary initiatives. Canadian public authorities have engaged in such knowledge production by conducting or sponsoring research and education regarding the design, implementation, verification, or effects of EMSs. With respect to research, numerous federal and provincial government departments have funded or carried out modest pilot projects, case studies, and surveys of the design, implementation, or performance of EMSs in particular firms or jurisdictions, but none have come close to the research programs on EMS that have been sponsored by various governments and public–private consortia in the United States and Europe.[45] Canadian governments have also supported EMS research by sponsoring research conferences on voluntary initiatives, publishing collections of research papers, and hosting electronic research discussion fora.[46] With respect to education, Canadian public authorities have propagated knowledge and expertise regarding EMSs through two principal modalities: training and publicity. Training ranges from basic primer courses for business people to advanced training for experts such as EMS auditors. More commonly, Canadian public authorities have responded to the emergence of voluntary EMS standards by simply publicizing information about EMSs, typically through passive means such as government websites. Such publicity is usually aimed at industry but sometimes at consumers as well. It usually encourages the use of EMSs and conveys information about EMS standards and the design, implementation, certification, advantages, or sector-specific applications of EMSs. It seldom enunciates public authorities' reservations or concerns since these are typically addressed in other contexts.[47]

These activities are closely related to official policy development and pronouncement[48] – research is a crucial input in policy development and education is an important channel for generating support for preferred policies among relevant constituencies. Governments often sponsor or conduct research and education programs as elements of carefully orchestrated policy projects and incorporate the fruits of non-state research and creativity into their own policy-making, effectively moving some policy development costs outside of government budgets.[49] In any event, these engagements with voluntary initiatives are usually integrated more or less into the public authorities' broader political agendas, particularly those springing from platforms of fiscal restraint, government downsizing, regulatory reinvention, free enterprise, and global competitiveness.

Reward

One of the most prominent themes in discussions of voluntary initiatives is the idea that voluntary initiatives can be the basis for a new relationship between regulators and industry – a relationship that emphasizes flexibility, efficiency, partnership, and market incentives rather than the perceived rigidity and inefficiency of conventional "command and control" regulation. In this light, public authorities in various countries, including Canada, have begun to incorporate voluntary EMS initiatives into their regulatory strategies by offering concrete rewards for voluntary EMS implementation. These rewards typically take three forms: (1) regulatory relief or forbearance (that is, the relaxation of existing regulatory requirements or forbearance from introducing new ones), (2) financial incentives, and (3) "green procurement" policies.

Regulatory Relief and Forbearance First, governments in several jurisdictions have begun to establish programs that relax existing regulatory requirements (such as permits, reports, inspections, or technology requirements) for firms that implement EMSs.[50] In 2001, Alberta became the first Canadian jurisdiction to launch an official program offering regulatory relief to firms that have EMSs in place.[51] Alberta Environment's Leaders Environmental Approval Document (LEAD) program, which is currently in a pilot phase, requires participating facilities to implement a very rudimentary EMS,[52] maintain a clean compliance record, demonstrate past environmental performance that exceeds legal requirements, commit to future environmental performance goals and measures that exceed legal requirements and that are based on continuous improvement and pollution prevention, implement meaningful public consultation, and report annually on performance. In return, facilities will receive modest regulatory incentives, such as preapproval for minor process and equipment changes, facility-wide performance targets ("bubbles"), performance- rather than technology-based requirements, and expedited permitting procedures, along with various forms of public recognition. Ontario is likely soon to follow with its own program, and other Canadian governments may be considering such programs as well.[53] In addition to these general regulatory exemption programs, some Canadian public authorities have experimented to a small degree with incorporating EMSs or EMS-related initiatives into government-industry negotiated agreements, but it is unclear to what extent such agreements have

involved the relaxation of existing regulations or a forbearance from introducing new rules.[54]

In addition, firms that have EMSs may be rewarded with leniency in enforcement after a regulatory violation is discovered. Environmental enforcement policies in some jurisdictions extend some leniency in the exercise of enforcement discretion to firms with EMSs. However, this is not the case in Canada. Although many environmental policy-makers and permitting authorities in Canada encourage firms to implement EMSs, Canadian environmental enforcement policies appear to give little or no weight to voluntary EMSs.[55] Upon conviction, courts may consider the implementation of a voluntary EMS as a mitigating factor in sentencing for environmental regulatory offences, although I am unaware of any instances of this happening.[56]

Financial Incentives While numerous foreign governments have offered grants, tax credits, preferential access to government loans, and other financial incentives for private sector EMS implementation or certification, Canadian public authorities, to date, have not made much use of these tools.[57]

Green Government Procurement Governments are among the largest purchasers of goods and services in a jurisdiction, and their purchasing policies can have a substantial impact on business. Many governments, including the Canadian federal government, have encouraged suppliers to implement EMSs or obtain third-party certification of their EMSs, but only a handful, none of which are Canadian, have made this implementation a formal purchasing preference or requirement.[58] Although green procurement policies may reward firms that adhere to voluntary initiatives, they can also have a coercive aspect. EMSs may ultimately be transformed into a *de facto* requirement for doing business if enough public and private sector buyers make EMS implementation or certification a purchasing requirement.[59]

Command

Both industry and government usually resist proposals to make voluntary initiatives mandatory. It is very uncommon for public authorities to issue legally binding commands requiring firms to implement EMSs or demonstrate their conformance to an EMS standard. On the rare occasion that such commands have been issued in Canada, it has been with the affected firms' or industry's support, either because they found the alternatives even worse, they were already planning to implement or obtain certification of an EMS, or they stood to benefit directly from the arrangement.

First, in a handful of cases, Canadian judges have used creative sentencing powers[60] to order an environmental offender to implement an ISO 14001-based EMS or to obtain ISO 14001 certification.[61] In every case, the defendant

has either proposed or agreed to the order, often because it was considering implementing or certifying an EMS anyway and could therefore expect lower fines and fewer charges in exchange. Prosecutors and judges support such orders because they believe ISO certification will enhance future compliance. Moreover, it is easy to verify and is obtained at the defendant's expense.[62] Second, Nova Scotia and New Brunswick were among the first jurisdictions in the world to make EMS implementation mandatory for all firms in a particular industry sector.[63] Both provinces have enacted regulations requiring gas pipeline operators to implement ISO 14000-based EMSs.[64] These developments were part of a move toward greater self-regulation in the sector. The governments supported mandatory ISO 14000 implementation as a credible external benchmark that would make self-regulation acceptable, while industry positively preferred ISO 14000 to government regulation.[65] Finally, Alberta's LEAD program will make implementation and maintenance of an EMS a licence term and specify the minimum elements of the EMS in the licence itself. This decision appears to be the first instance in Canada in which regulators will require EMS implementation or certification as a term of an operating permit or administrative order.[66]

Industry's willingness to have these EMS standards turned into binding legal requirements may also reflect the special role that voluntary standards developed by formal standardization bodies, such as the CSA and the ISO, play in government regulation. Governments have a long tradition of incorporating voluntary technical standards (for example, for building materials, construction, plumbing, fire safety, engineering, food safety, medical devices, and so on) into mandatory regulations.[67]

In addition to these "public law" methods, the terms of a voluntary EMS initiative may be made mandatory through private litigation. A firm may agree to adhere to an EMS standard or other voluntary initiative in an agreement with regulators, a commercial supply contract, or trade association membership agreement.[68] Such a voluntary undertaking may be converted into a legally binding command when a party to the agreement seeks judicial enforcement of the agreement.[69] Some commentators believe that these private law enforcement tools hold the key to successful regulation of corporate behaviour through voluntary codes.[70]

Other Engagements

Finally, three other modes of engagement can be discerned in Canadian public authorities' interactions with voluntary initiatives other than EMSs. These engagements may at some point be employed in relation to EMS initiatives.

Benchmarking Canadian courts often use widely accepted voluntary standards and other evidence of industry custom as benchmarks[71] for determining

whether a defendant exercised "reasonable care" in a tort case[72] or "due diligence" to avoid committing a regulatory offence.[73] Several commentators and government officials have suggested that implementation of an ISO EMS constitutes "due diligence."[74] Although no Canadian court has yet to use voluntary EMS standards as a benchmark for liability, the prospect is increasingly likely and deserves critical attention because:

- it is doubtful that an ISO 14001 EMS satisfies the requirements of reasonable care. While it enables an organization to implement systematically its own environmental goals and prevent unplanned pollution incidents, it does not require the organization to achieve any particular level of environmental performance or legal compliance – its focus is on ensuring *conformance to the standard* rather than avoiding breach of legal duties of care;
- the use of EMS standards as benchmarks for liability may give voluntary industry-developed initiatives a power that they could not achieve on their own, by effectively imposing the terms of such initiatives on organizations that neither used the initiative nor participated in its development;[75] and
- the prospect of such judicial benchmarking may place other state actors in a dilemma, as Kernaghan Webb points out. If government officials fail to participate in the development of voluntary initiatives, "there is a risk that the standards produced will be considered reasonable by judges ... even though they may be viewed as inadequate by government"; but if government officials do participate in the development of voluntary initiatives in an effort to influence their content, it may be difficult for prosecutors to argue later that the initiative does not constitute "due diligence" even though the government's views may not have been reflected in the initiative as adopted.[76]

Challenge Another mode of engagement with voluntary initiatives that has been pursued by some public authorities in the environmental arena is to challenge firms to pledge to implement voluntary environmental measures and report their results publicly. This is often used as an alternative to introducing new regulatory measures. In Canada, it has been used to address such issues as greenhouse gas emissions and releases of toxic substances, but no government has yet developed a challenge program involving the industry adoption of EMSs.

Borrowing Finally, public authorities can incorporate voluntary initiatives developed by non-governmental bodies into legal instruments without making their observance mandatory. For instance, statutes, regulations, operating permits, or agreements with regulated entities might specify a voluntary standard as a default basis for issuing approvals; make exceedance of a voluntary standard the trigger for documentation, reporting, or remediation duties; adopt a voluntary standard's definition of a term; or authorize the use of a voluntary standard for testing, inspecting, or measuring a regulated entity's operations, equipment, or products. Although this has not been done with EMS standards, one could imagine regulations, for example, authorizing the use of ISO environmental auditing standards or specifying ISO 14001 certification as a basis for "deemed" approval of particular kinds of activities.

Implications for the Public–Private Divide

For the most part, these interactions among public authorities and voluntary non-state initiatives occur in a quiet corner of environmental politics populated mainly by technical experts – indeed, in a space that many participants do not even perceive as political. Nonetheless, the participants are involved, wittingly or unwittingly, in the definition and redefinition of the scope and concerns of politics and law in the field of the environment. It would not be accurate to view these developments as evidence of a "relentless augmentation of the powers of a centralizing, controlling and regulating state" that has increasingly colonized the "lifeworld."[77] It would be absurd to suggest that Canadian public authorities' engagements with voluntary environmental initiatives evidence a takeover of society and the market by the agents and machinery of the state. Nor, on the other hand, does the evidence reveal a takeover of public policy-making by industry. Rather, what emerges is a range of heterogeneous, shifting links among a variety of public and private authorities, through which these authorities pursue their goals not so much by domination and control as by exercising subtle and unpredictable influences upon the interests, beliefs, and choices of free individuals. These links rely upon a range of experts and associated bodies of knowledge perceived to be relatively autonomous from both politics and the market (for example, accounting, engineering, standardization, and law); and they involve alliances and tensions not just between public and private authorities but also among a multiplicity of public authorities themselves (for example, government ministers, environmental commissioners, legislators, regulators, inspectors, prosecutors, judges, and government purchasing personnel).

This hybridization of law and market, state and non-state, suggests the need for an alternative characterization of "government" that moves beyond the metaphor of a public–private divide to encompass the entire complex of ideals, goals, rationales, techniques, procedures, and programs by which a diversity of state and non-state authorities seek to shape human conduct to their desired ends. This alternative conception of government prompts us, first, to examine law and politics at the level of the mundane

techniques by which various authorities seek to effectuate their governmental ambitions. Viewed this way, EMSs and EMS standards instantiate a broader tendency in contemporary practices of government in the advanced industrial democracies to "depoliticize" certain issues and problems by positioning them either as technical matters to be resolved by the application of neutral expertise or as private matters to be resolved by market forces. The EMS example also signals a shift in political rationales, a redrawing of the appropriate aims and forms of "governance," of the boundaries of politics, law, and market, and of the distribution of tasks between different authorities. Finally, it is possible to make some tentative suggestions as to the role law might play in facilitating or resisting these transformations.

Beyond the Public–Private Divide: An Alternative Conception of Government

One of the questions posed by the organizers of this symposium was whether the metaphor of a public–private divide is still appropriate. The problem with using such language to analyze contemporary practices of ordering and directing social relations, as Nikolas Rose and Peter Miller point out, is that "the political vocabulary structured by oppositions between state and civil society, public and private, government and market, coercion and consent, sovereignty and autonomy and the like, does not adequately characterize the diverse ways in which rule is exercised in advanced liberal democracies."[78]

What is needed is an alternative way of thinking about government, which avoids the limitations of these dichotomies. There is nothing new in this suggestion, of course. These dichotomies have been questioned repeatedly by successive waves of criticism in legal studies, from legal realism, to feminist legal theory, to critical legal studies, to legal pluralism. Exploding, fragmenting, or contextualizing categories of state, sovereignty, public, private, and so on have been regular features of criticism and innovation in the social sciences and law throughout the last century – so much so, that proclaiming the "death of the state" has become part of the ritual of renewal in discipline after discipline.[79] Scholars have repeatedly attempted to sever the "king's head" in social and legal thought, yet the next generation of critics always seems to find it back on the sovereign's shoulders.[80]

The fact that these conventional categories remain central to the theories and practices of government after all this critical attention is a puzzle in itself. We might gain analytical leverage over this puzzle if we focus on the *problematics of government* instead of over-valuing the problem of the *state*.[81] The example of EMSs and EMS standards demonstrates that the regulation of environment-economy interactions is accomplished by an array of public and private authorities and institutions, including standardization bodies, EMS auditors and certifiers, consultants, corporate managers, customers, regulatory agencies, legislatures, government inspectors, courts, and (to a lesser extent) labour unions, consumers, and public interest NGOs. It is the practices and projects of this array of state and non-state authorities that "make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on."[82] In this context, the familiar feminist claim that "the personal is political," modified to read "the private is public," may be more appropriate than the metaphor of a public–private divide to characterize the implications of voluntary EMS standards.

Disrupting the public–private dichotomy, however, does not mean denying its continuing relevance. Rather, it calls for a broader conception of government, which enables us to uncover and examine the ways in which conventional divisions between state, society, law, market, public, and private are used to position certain concerns within and others outside the domains of politics, law, or the state. This uncovering may in turn allow us to reclaim excluded concerns for contestation or examine how such exclusion or inclusion tracks or reproduces social relations of power and inequality.

In this broader conception, "government" can be understood as the entire collection of goals, rationales, plans, procedures, and programs by which a diversity of state and non-state authorities seek more or less systematically to shape the conduct of individuals, organizations (including firms), and populations to their desired ends.[83] Michel Foucault coined the term "governmentality" to describe the techniques and justifications by which government, in this sense, is effectuated.[84] Governmentality can be analyzed in terms of political rationalities and governmental technologies. Political rationalities are "the changing discursive fields within which the exercise of power is conceptualized, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors."[85] Governmental technologies are "the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions."[86]

Expertise plays a key role in governmentality. In the field of environmental management, expertise in the form of the specialized knowledges and vocabularies of environmental management consultants, standardization experts, auditors, and certifiers provides a link between the governmental objectives of public and private authorities and the minutiae of daily life in factories, offices, markets, and homes. Making this link is crucial because neither complete knowledge nor total control of the conduct of individuals, groups, firms, or populations is possible. Liberal forms of government rely on "action at a distance," recognizing a reserved domain for individual, autonomous action and moulding the conception and exercise of this capacity for action without destroying its autonomy.[87] Expertise makes it possible

to "reconcile the principle that the domain of the political must be restricted with the recognition of the vital political implications of formally private activities."[88] Experts forge a link between authorities and subjects of rule, while preserving the autonomy of a "private" sphere, by translating the governmental concerns of authorities and the daily worries of individuals and groups into specialized technical vocabularies that claim the power of truth and objectivity and offer techniques to manage better, live healthier, and align individual choices with governmental ends.[89]

A few socio-legal scholars have examined law from a governmentality perspective,[90] and, more recently, a small number of environmental studies scholars have begun to apply governmentality analysis to environmental politics.[91] In the next two sections, I explore what it might mean to apply governmentality analysis to the interface between environmental law and voluntary corporate initiatives.

EMSs as Governmental Technologies

EMSs and EMS standardization can be viewed as technologies for governing human-environment interactions – collections of standard procedures, routines, techniques, and documents through which the aspiration to manage the environmental impacts of an organization's activities, products, and services is rendered operable. It is through these sorts of detailed, repetitive, mundane mechanisms –such as assessing the environmental impacts of an organization's activities; setting environmental objectives and targets; developing and applying environmental performance indicators; assigning organizational roles and responsibilities; establishing and documenting operational procedures and controls; training employees; measuring and monitoring the organization's performance; testing and calibrating measurement equipment; calculating, computing, and analyzing data; maintaining and managing records; and auditing and reviewing the management system – that the governmental ambitions and schemes of public and private authorities are instantiated.

What is revealed by viewing voluntary EMS initiatives in this light? EMSs treat the problem of environmental degradation as a question of managerial technique, to be resolved by the application of neutral technical expertise in light of the judgments of commercial actors in the market place. Conflicts about public health, environmental quality, competitiveness, corporate accountability, and dominance among competing firms or trading blocs are acted out as if they were merely technical matters.[92] The result, as we shall see, is the depoliticization of a set of important environmental, public health, and economic issues.

The development, standardization, and implementation of EMSs are driven and dominated by industry. Within the EMS standardization community and among most public authorities, this is generally acknowledged as being

appropriate – industry is the primary user of the standards and should play the major role in developing and implementing them.[93] EMS standards are primarily a form of corporate self-regulation, and, as such, it is no surprise that their development is dominated by business firms (especially multinational corporations) and associated professionals and that their content reflects the needs and interests of increasingly mobile capital in a global economy.[94] It is also no surprise that EMSs address a number of issues with vital political implications. These issues include:

- the acceptable environmental impacts of business: EMSs address this issue by establishing processes within each organization to identify the significant environmental impacts of its activities, products, and services and set, implement, monitor, and measure its own environmental objectives and targets;
- the improvement of environmental performance: EMSs leave it to each organization to decide whether, how, and at what rate to improve its environmental performance;[95]
- the question of how to manage the risk of disaster: EMSs consider the risk of environmental disaster as a matter for proper emergency planning rather than as a reason to question the continued use of certain activities or substances;
- the role of public consultation and accountability in environmental management: most EMSs treat public environmental reporting and the views of local communities, the public, and NGOs as matters for "stakeholder management," which are to be used by the organization to the extent that it considers necessary or desirable to maintain its viability or competitiveness;[96]
- the relationship between voluntary initiatives and state regulatory systems: EMSs erect a distinct barrier between themselves and state regulatory systems, positioning the latter as a special element of the EMS's external environment that generates obligations and expenses for the organization and possesses exclusive authority and responsibility to determine societal environmental goals and impose corresponding legal requirements. The EMS addresses this external regulatory system through a policy commitment to legal compliance and a set of processes that treat legal requirements much like other performance parameters,[97] but the incompleteness of the arbitrage between legal systems and the EMS is underlined by the fact that organizations, which have been convicted of environmental regulatory violations, have still been certified as conforming to ISO 14001; and
- verification of environmental claims and performance: EMSs treat the question of verification of an organization's environmental performance or their adherence to particular standards as matters for objective, neutral

determination by independent commercial experts who operate with specialized professional training, tools, and vocabularies, provide verification services for profit, and treat the information on which verification is based as confidential so that the only information disclosed publicly is whether the organization has conformed or not conformed with an EMS standard.

On the one hand, standardization bodies and other EMS proponents frequently acknowledge these political stakes at least implicitly (for example, by characterizing voluntary EMS standards as a contribution to public policy goals, such as sustainable development, by admitting that the development and use of EMS standards implicate important public interests, or by calling for broader "stakeholder" participation in standards development and corporate environmental management). On the other hand, the same actors regularly remind each other and anyone else that EMSs (and standards generally) are primarily useful tools developed by business, for business, pointedly declining to characterize the involvement or conflicting interests of industry participants as "political."[98]

What is most interesting for our present purposes is that the choice to employ the techniques of management systems and standardization appears to predispose the resolution of this ambivalence about the political stakes of corporate environmental management. The techniques and procedures of standardization and EMSs deactivate these political stakes by transforming them into technical matters to be resolved by the application of professional expertise, according to apparently neutral technical criteria, while simultaneously turning them into matters of consumer or commercial preference to be resolved by the exercise of autonomous choice in market transactions. EMSs constitute environmental protection as an apolitical matter to be administered through bureaucratic organizations. While they can, in theory, be adapted to organizations of all types and sizes, EMSs are modelled on the management hierarchies and processes of large business organizations. They emphasize routine, procedure, paperwork, formality, and technical expertise. They rely largely on private-market dynamics to signal the need for, and success of, these technical procedures and decisions, through the preferences and demands of customers, suppliers, or ultimate consumers. The EMS is quintessentially a technology of the large bureaucratic organization.[99]

Standardization, for its part, transforms conflicts over market dominance, trade barriers, international competitiveness, health, safety, and environmental protection into technical decisions for experts, and it submits the determination of the appropriateness of the resulting standards to the market through firms' decisions to purchase and implement the standards and market participants' demand for certified products or firms.[100] Standardization has been called "the housework of capitalism;" like housework, it is

"detailed, mundane, repetitive, and never completed," and it is "both essential and unrecognized in the constitution and reproduction of economic and class relationships."[101] It is "usually considered a 'MEGO' ('my eyes glaze over') subject" in most corporate boardrooms.[102]

EMSs and EMS standards are a significant form of governmental technology precisely *because* they make one's "eyes glaze over" – that is, they mute the struggles over the distribution of risks, harms, jobs, and profits, which are inherent in environmental politics. By transforming debates over justice, poverty, racism, ecological integrity, animal rights, the intrinsic value of nature, and so on into matters of managerial expertise and market preference, these technologies both enable relations of inequality and repression to be perpetuated and disguise their own role in that perpetuation.

In these respects, EMSs and standardization instantiate a broader tendency in contemporary liberal practices of government to depoliticize certain political stakes by positioning them either as "technical" matters to be resolved by the application of neutral expertise or "private" matters to be resolved by market forces.[103] The tendency to "technicalize" is commonly associated with welfare state liberalism (for example, the creation of social insurance schemes), while the "privatization" tendency is commonly associated with free-market neoliberalism. EMSs, interestingly, embody both tendencies, perhaps reflecting some of the complexity and ambivalence in the encounter between welfarist and neoliberal mentalities in contemporary government.

In general, Canadian public authorities have allowed or encouraged this (re)drawing, without attempting to push the content or the use of EMSs in any particular direction. Their engagements (for example, implementing their own EMSs as examples for industry, encouraging or requiring firms to implement EMSs, and beginning to offer crudely crafted regulatory relief programs to firms with EMSs) have been relatively credulous and unreflective in comparison to those of American and European public authorities. One might criticize these engagements as an abdication of governmental authority to regulate corporate practices, but this point begs the question of how different state regulation is from private self-regulation. Among the possible differences are the following. First, official regulations are not developed by regulated entities themselves but by government officials with ultimate accountability to an electorate. This separation between regulators and the regulated in standard-setting is often criticized as being illusory, however, due to a heavy reliance on industry for information, an increasing "customer service" orientation toward regulated industry in some governments, intense negotiation with industry over pollution standards, and the risk of regulatory "capture" of government agencies by industry. Second, state regulatory systems usually have public consultation processes that do not depend on the regulated entity's discretion (for instance, notice and

comment, environmental assessment, and judicial review), yet these are often perceived to be underused and ineffective. Third, there is Garret Hardin's famous question, "who will watch the watchers?"[104] Most governments have established formal, public mechanisms to monitor the behaviour of regulatory agencies, from government watchdog agencies to citizen suits and judicial review, whereas monitoring of EMS auditors and certifiers is generally non-public and achieved mainly through accreditation processes that are supervised by standardization bodies themselves or even more obscure institutions.[105] Moreover, since auditors and certifiers rely on their clients for income, there is some risk of "regulatory capture" by the client companies. While this danger is real, the risk of regulatory capture also exists in regulatory agencies, particularly given the recent tendency of many environmental agencies and their political masters to reinvent industry as clients to be served rather than as polluters to be controlled.

More importantly, the technologies of contemporary state environmental regulation embody, to a significant extent, the same managerialist tendencies as EMSs to obscure the stakes, struggles, and repressions of environmental politics, relying heavily on technical expertise, detailed, mundane, repetitive techniques of measurement, monitoring, calculation, assessment, inspection, and so on, and relying increasingly on private-market dynamics. While EMSs are a particularly clear example of these tendencies, state environmental regulation shares the same characteristics to a significant degree.

Viewed as governmental technologies, then, EMSs and standardization render environmental management a matter of technical expertise, an organizational routine, and market preference, contributing to the expulsion of a set of environmental and economic issues from the political domain.[106] Not all voluntary corporate initiatives share these characteristics, but this case nonetheless draws attention to the benefits of examining the problems of "government" at the level of mundane mechanisms of rule. Such an examination can enable one to expose the redrawings of the public–private divide and reclaim environmental management as an arena for political contestation.

EMSs and the Shifting Rationales of Governance

The organizers of this symposium asked participants to consider the extent to which the blurring of the public–private divide signals a shift in the rationales of governance.[107] The case of an EMS provides evidence of such a shift of political rationalities, not just in the area of corporate environmental management but also in governance generally. Political rationalities provide the discursive "software" through which governmental technologies operate and produce effects.[108] The political rationality of EMSs – that is, the discursive field within which the forms and goals of governance, the proper

boundaries of state and market, and the roles of public and private authorities are conceptualized and justified – reinforces the tendency of EMSs and standardization, described earlier, to depoliticize environmental management.

The political rationality of EMSs consists of a set of ideas, claims, justifications, themes, and story-lines about environmental management that are developed and maintained by a transnational coalition of corporate managers, industry groups, management consultants, trade publications, standardization professionals, public authorities, academics, and others. These actors are united not by a common goal or strategy (indeed, many of them have never met, let alone agreed on goals or strategies) but rather by their employment of a particular set of claims and story-lines about the challenge of environmental degradation and the appropriate tools and actors to address it.[109]

First, the discourse of an EMS reflects a distinctly "managerialist" view of the challenge of environmental degradation. Improving management practices, in particular, by adopting an organization-wide management system based on the "total quality management" concept, is the best way to improve the environmental performance of organizations and their products.[110] This implies a particular conception of the environmental crisis. While acknowledging that industrial society has produced severe environmental degradation, the managerialist conception does not view this crisis as a fundamental challenge to existing institutions and practices of industrial society. Rather, major environmental disasters of recent memory are interpreted primarily as management process failures, the environmental crisis is seen as being under control and gradually improving, and well-planned and properly implemented management systems are seen as the key to managing the adverse environmental impacts of business.[111] The environmental crisis is something to be managed through the application of managerial skill, objective technical expertise, organizational routine, and individual motivation.

Second, this managerialist approach is portrayed as both effecting, and depending for its own effectiveness upon, a transformation of corporate culture. The main potential of an EMS is often identified as its capacity to change organizational culture by integrating environmental protection into all activities and decisions of the enterprise.[112] This cultural transformation is accompanied by an ethic of individual responsibility for environmental protection, from the chief executive officer to the lowliest employee. An EMS "gathers all your employees and managers into a system of shared and enlightened awareness and personal responsibility for your organization's environmental performance," relying on training, competence, and motivation of individual employees rather than on blind obedience to regulations or corporate directives and the punishment of errors.[113]

Third, one of the most striking attributes of the discourse of EMSs, which is shared by most contemporary voluntary environmental initiatives, is its

reinvention of environmental protection as "good business" rather than an unfortunate cost. The discourse presents both aggressive and defensive business rationales for EMSs. On the one hand, EMSs create "win-win" opportunities to improve environmental performance and increase shareholder value by enhancing corporate image, improving customer relations, realizing cost savings (for example, via energy conservation or waste recycling), and promoting innovation (for instance, product and process improvements).[114] On the other hand, EMSs are portrayed as defensive tools to maintain and increase competitiveness, especially in the face of globalization and trade liberalization.[115]

Fourth, EMSs and EMS standards are portrayed as a basis for a constructive new relationship with regulators and the public, which is based on cooperation and partnership rather than on coercion and mistrust.[116] The traditional "command and control" mode of regulation is acknowledged to have produced many successes, but it is seen as having reached its limit. EMSs are presented as a market-driven, voluntary, flexible, efficient, and effective alternative or supplement to sclerotic, inefficient, costly, rigid, near-sighted, backlogged, overtaxed, sometimes adversarial, and ineffective regulatory systems.[117] Private-market dynamics, in the form of supply-chain pressures, consumer demand, and trade association requirements, are positioned as constructive alternatives to messy political deliberations and inflexible, inefficient legal systems.[118] In turn, the citizen, who was formerly dependent on welfare state paternalism, is reinvented as the autonomous, self-helping consumer, exercising individual environmental responsibility through consumer choice.

All of these claims and story-lines are linked by an overarching goal and moral justification – that EMSs and EMS standards will contribute to the realization of sustainable development.[119] This claim is common in the discourses of corporate greening and is shared not just with most corporate environmental initiatives but also with almost all environmental policy initiatives in the last decade.

Finally, the discourse locates EMSs in a non-political arena. While acknowledging the political effects of EMSs and EMS standards (for example, their contribution to sustainable development, international trade, or state regulatory policy), the discourse of an EMS positions corporations, standards bodies, and EMSs as operating outside politics, in contrast to such "politically oriented bodies" as environmental NGOs, political parties, and public authorities.[120] The political rationality of an EMS thus redefines the legitimate concerns of the state in a manner that carves out a substantial chunk of environmental politics for organizations such as business firms to resolve on their own through technocratic management and private-market signals. It vests the elaboration and application of important norms of conduct and the delivery of certain environmental public goods in large NGOs,

such as multinational corporations, standardization bodies, consulting firms, auditors, and certifiers. It presents a particular conception of the appropriate roles of the firm, market, employee, citizen, and state in managing environmental risks and harms and justifies these arrangements for the exercise of power in terms of good business sense, proper management processes, individual employee responsibility, the potential for autonomous consumer choice, the limits of the regulatory state, and the ultimate pursuit of sustainable development.

This redrawing of the domain and forms of government is closely linked to two broader political discourses: ecological modernization and smart regulation. Ecological modernization has emerged, since the late 1970s, as the dominant way of conceptualizing environmental problems in the advanced industrial democracies.[121] Ecological modernization understands environmental harm to be a systematic product of the modern industrial "risk" society, but one that can be addressed through technocratic management. In this vision, the environmental crisis no longer represents a fundamental threat to industrial society, as it did in the 1970s, but rather as an opportunity for its further development. Environmental protection and industrial development are compatible "win-win" propositions. The pursuit of sustainable development, which is one of the key moral justifications of EMSs, is intimately linked with ecological modernization by virtue of its emphasis on the integration of environmental considerations into all business and governmental decision-making, the consideration of, and communication with, a broad range of stakeholders, and the susceptibility of environmental crisis to rational management. The political rationality of EMSs thus coincides very closely with the discourse of ecological modernization.

Another prominent discourse in contemporary environmental politics, which is closely related to, and perhaps subsumed in, ecological modernization, is the discourse of "smart" or "responsive" regulation.[122] This discourse acknowledges the accomplishments of "command and control" regulation but argues that it has reached the limits of its cost-effectiveness and technical capacity, due to cost, inefficiency, inflexibility, and regulators' resource and information constraints. On the other hand, this discourse also rejects neoliberalism, with its radical scepticism about the capacities of the state to govern for the best and its enthusiasm for free markets, property rights, and deregulation. It argues that most "regulation" is already in the hands of actors other than the state and uses this insight to propose a new conception of the regulatory process that transcends sterile regulation-deregulation and market-state dichotomies. It proposes new regulatory strategies that combine state, market, private and public actors, and forms of regulation and enlists non-state resources and mechanisms, such as self-regulation, EMSs, ecolabelling schemes, environmental reporting, and industry-community agreements, in furtherance of the notion of "governing

at a distance."[123] Some variants of this discourse draw upon private sector management discourses to promote competition and marketization in government functions, a "client service" orientation in public administration (regulated entities as clients, state as service provider), individual autonomy (individuals as self-helping, autonomous, co-responsible entrepreneurs), and managerialism (conceptualization of life in entrepreneurial terms; use of managerial techniques).[124] This discourse of regulatory reinvention meshes well with the discourse of EMSs and provides the broader rationale for most of the engagements I have observed between Canadian public authorities and EMS initiatives.

This examination of the political rationalities of EMS suggests two things. First, that the deactivation of political conflict seen in the discourses of EMSs and standardization will be one of the key political challenges in the era of "smart regulation." The political rationalities of EMS constitute the realm of EMSs as a private, voluntary order in dichotomous, sometimes antagonistic, relation to the messy, inefficient, public realm of law and politics and simultaneously obscure the process by which this division between public and private realms is created, by representing EMSs as always already private, voluntary, and non-political.[125] The interpretation of environmental crisis as a "win-win" proposition, an opportunity for entrepreneurial thinking, and a matter for expert, technocratic management "at a distance" reinforces this tendency to mute the political struggles and distributive stakes of environmental management.

Second, it seems likely that "steering" may emerge as the most prominent form of engagement of public authorities with private authority in the field of environmental governance. The increasing emphasis on "action at a distance" in the current mentalities of government points to a conception of the state as helmsman, selectively steering the development and use of regulatory strategies and tools by others through participation in the creation of voluntary programs, funding of non-state policy development institutions such as standardization bodies, providing high-level strategic direction for non-state policy-making, pronouncing official positions on voluntary initiatives, and regulating the ground rules, boundaries, and limits of non-state governance by manipulating competition, securities, corporate and consumer protection law, public participation rules, and regulatory "backstops." One might also expect "reward" and "self-discipline" to figure prominently in state strategies as public authorities attempt to steer environmental self-government by offering regulatory incentives and setting examples through the self-application of voluntary disciplines.

What Role for Law?

I conclude with some tentative suggestions about the role for law in the transformation of the public–private divide in Canadian politics. My research into

EMSs and EMS standards reveals two important characteristics of contemporary government. First, government (understood as being all of the more or less systematic attempts to direct human conduct to appropriate ends) is widely distributed among a myriad of public and private authorities in a hybridized public–private space. Second, in any given problem space, the unequal distribution of governmental authority tends to produce and reproduce social relations of power and inequality. Two general conclusions follow from these observations: that some form of "smart regulation," relying on a mix of state and non-state actors and regulatory tools, is appropriate to deal with the distributed character of government, but that, in addition, a key challenge in the design and exercise of such government will be to resist the tendency to "depoliticize" through the move to neutral technical expertise and private-market transactions. Opening space for such resistance requires, first of all, attention to the political stakes that EMSs and EMS standards tend to submerge. This involves asserting the politics of "merely technical" choices,[126] such as the decision to delegate authority to technical experts or the private market and the construction of the citizen as autonomous consumer and self-helping entrepreneur. It also calls for more concrete exploration of the distributive consequences of corporate environmental management decisions than I have attempted in this essay, along with a more detailed examination of how the rationalities and technologies of environmental management produce and obscure such consequences.

Law and legal practitioners can play numerous roles in the politics of voluntary EMS standards – in some cases, facilitating and shaping the expansion of "private" non-regulatory initiatives, in others, resisting it, and still in others, playing little or no role. While strategies and techniques deployed in legal relations can probably have a significant impact on the transformation of the public–private divide, in the case of EMS standards, this potential has so far gone largely unrealized in Canada. Although Canadian regulators, legislators, and courts have employed most of the modes of engagement that I describe in the second part of this essay, it is fair to say that their responses to voluntary EMS initiatives have been minimal and incoherent.

The important question for present purposes is whether and how law can be used to resist the depoliticization of environmental management – that is, to insist on the political stakes of environmental management decisions and create space to work toward greater justice, equality, human health, and ecological integrity? At a minimum, law might be deployed as a "border guard" to define and protect certain "public" stakes of EMSs. EMSs can be a very useful tool for organizations internally as well as in their relations with business partners and market participants, but many (including ISO 14001-based EMSs) provide inadequate guarantees of public consultation and accountability, environmental performance, and legal compliance to merit giving them any particular weight in non-market relations with governments

and the public. Legal tools and strategies should be designed, at a minimum, to insist on these basic public stakes when rewarding or relying on them in state regulatory instruments (for instance, by requiring more than the minimal "basic EMS" defined in Alberta's new LEAD program, requiring public consultation and transparency in the setting, monitoring, and review of environmental performance, and rewarding only firms that consistently exceed compliance with legal requirements, including the improvement of performance on non-regulated parameters). Basic corporate governance rules, requiring the maximization of shareholder value, might be revisited to expand the range of "stakeholders" whose interests managers are permitted (or required) to take into account. Moreover, legal actors such as prosecutors and courts should be urged to take a firmly sceptical attitude toward EMSs and EMS standards and inform themselves fully of their characteristics before incorporating them in orders or using them as a standard for liability.

More ambitiously, governments, lawyers, and citizens might use law as part of a broader political strategy to influence the redefinition of public and private in the context of environmental management. The role of law and legal practitioners in this strategy could be to claim and defend a broad space for democratic experimentation in the face of the homogenizing tendencies of global trade liberalization (as evidenced, for instance, in the TBT Agreement) and government "reinvention." Just how this might be done is a question for further research.

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Notes

1 *ISO 14001: 1996, Environmental Management Systems – Specification* with *Guidance for Use* (Geneva: International Organization for Standardization [hereinafter ISO], 1996).

2 *ISO 14004: 1996, Environmental Management Systems – General Guidelines on Principles, Systems and Supporting Techniques* (Geneva: ISO, 1996). Both ISO 14001 and 14004 are currently being revised within the ISO, with publication of second generation standards expected to be released in 2003.

3 Ecolabelling programs may apply across a range of products, such as Canada's Environmental Choice program, or they may be product-specific, such as ecolabels for bananas, coffee, or forest products.

4 The most prominent programs are the Forest Stewardship Council's program for certifying sustainable forest management operations and the Marine Stewardship Council's program for certifying sustainable fisheries management operations.

5 The number of ISO 14001 registrations worldwide reached approximately 30,000 by July 2001. For data on registrations, see Gergely Tóth, "The ISO 14001 Speedometer," available at <http://www.inem.org/htdocs/iso/speedometer/speedometer-4_2001.html> (accessed 30 October 2001).

6 See, for example, Joseph Cascio, "Introduction," in Joseph Cascio, ed., *The ISO 14000 Handbook* (Milwaukee: ASQ Quality Press, 1996), 1 at 1: "The ISO 14000 standards hold out the promise to revolutionize environmental protection as we have known it in the past quarter century"; Ruth Hillary, ed., *Environmental Management Systems and Cleaner Production* (Chichester, UK: John Wiley and Sons, 1997); Amy Pesapane Lally, "ISO 14000 and Environmental Cost Accounting: The Gateway to the Global Market" (1998) 29 Law and Pol'y Int'l Bus. 501. For other examples, see note 12 in this essay.

7 See, for example, Riva Krut and Harris Gleckman, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (London: Earthscan, 1998); Saeed Parto, "Aiming Low," in Robert Gibson, ed. *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, ON: Broadview, 1999), 182. For other examples, see note 12 later in this essay.

8 See, for example, A. Claire Cutler, Virginia Haufler, and Tony Porter, eds., *Private Authority and International Affairs* (Albany: State University of New York Press, 1999); and Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington, DC: Carnegie Endowment for International Peace, 2001).

9 See, for example, Cass Sunstein, "Paradoxes of the Regulatory State" (1990) 57 U. Chi. L. Rev. 407; Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990); D. Osborne and T. Gaebler, *Reinventing Government* (Boston: Addison-Wesley, 1992); Ian Ayres and John Braithwaite, *Responsive Regulation* (New York: Oxford University Press, 1992); and Neil Gunningham and Peter Grabosky, *Smart Regulation* (Oxford: Clarendon, 1998).

10 See, for example, Gunningham and Grabosky, *supra* note 9; Gibson, *supra* note 7; Carlo Carraro and François Lévêque, eds., *Voluntary Approaches in Environmental Policy* (Dordrecht: Kluwer, 1999).

11 Compare with Liora Salter, *Mandated Science: Science and Scientists in the Making of Standards* (Dordrecht: Kluwer, 1988) at 31-32 and 178-80 (arguing that the debate over regulation versus deregulation neglects the reality of standards, which are neither fully public nor fully private and always involve some degree of coordination between public and private sectors).

12 See, for example, Naomi Roht-Arriaza, "Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment" (1995) 22 Ecology L.Q. 479-539; Scott Butner, "ISO 14000 – Policy and Regulatory Implications for State Agencies," paper presented at the National Pollution Prevention Roundtable Annual Meeting, 10 April 1996, available at <http://www.seattle.battelle.org/p2online/isoregs.htm> (accessed 21 June 2001); Anthony Reiley, "The New Paradigm: ISO 14000 and Its Place in Regulatory Reform" (1997) 22 J. Corp. L. 535; Henry Balikov and Patrick Cavanaugh, "The Overselling of Government 'Reinvention': How Government Expectations of EPA's Project XL and ISO 14000 May Prove Counter-Productive" (Spring-Summer 1997) Albany Law Environmental Outlook 23; Naomi Roht-Arriaza, "Developing Countries, Regional Organizations, and the ISO 14001 Environmental Management Standard" (1997) 9 Geo. Int'l Envtl. L. Rev. 583; Douglas Taylor, "Is ISO 14001 Standardization in Tune with Sustainable Development?" (1998) 13 J. Envtl. L. and Litigation 509; Douglas Taylor, "ISO 14000 and Environmental Regulation" (1999) 9 J. Envtl. L. and Practice 1; Paula C. Murray, "Inching Toward Regulatory Reform – ISO 14000: Much Ado about Nothing or a Reinvention Tool?" (1999) 37 Am. Bus. L.J. 35; Keith Pezzoli, "Environmental Management Systems and Regulatory Innovation" (2000) 36 Cal. W.L. Rev. 335; Pollution Probe, *The Future Role of Environmental Standards* (Ottawa: Pollution Probe, 2000); Paulette Stenzel, "Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?" (2000) 37 Am. Bus. L.J. 237; Jason Morrison et al., *Managing a Better Environment: Opportunities and Obstacles for ISO 14001 in Public Policy and Commerce* (Oakland, CA: Pacific Institute, 2000), available at <http://www.pacinst.org> (accessed 30 July 2001); Roy W. Shin and Yu-Che Chen, "Seizing Global Opportunities for Accomplishing Agencies' Missions: The Case of ISO 14000" (2000) 24 Public Administration Quarterly 69-94; Dianne Saxe, "ISO 14001/14004 and Compliance in Canada," paper prepared for the Canadian

Standards Association, 20 December 2000 (copy on file with author); Cary Coglianese and Jennifer Nash, eds., *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington, DC: Resources for the Future, 2001).

13 A notable exception is Errol Meidinger's work on the interaction between the US legal system and environmental certification systems, including EMS standards. See, for example, Errol Meidinger, "Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think" (2001) 31 Environmental Law Reporter 10162.

14 The literature on voluntary environmental initiatives generally lacks systematic inquiry into how non-state regulatory systems interact with each other and with other forms of regulation, or how state actors can engage with voluntary initiatives in an integrated public–private regulatory strategy. Notable exceptions include Ronald B. Mitchell, *Intentional Oil Pollution at Sea* (Cambridge, MA: MIT Press, 1994); Gunningham and Grabosky, *supra* note 9; Kernaghan Webb, "Voluntary Initiatives and the Law," in Gibson, *supra* note 7 at 32; Kernaghan Webb and Andrew Morrison, "Voluntary Approaches, the Environment and the Law: A Canadian Perspective," in Carraro and Lévêque, *supra* note 10 at 229.

15 Two caveats are in order. First, these eight categories of engagement overlap substantially. A single program or action may involve several modes of engagement simultaneously. Second, the list of categories is tentative and open-ended, subject to variation with changing information and the character and purposes of analysis. Its main purpose is not to set down a definitive typology but to expose the extent and variety of interactions among public and private authorities in the field of environmental management.

16 Pollution Probe, *supra* note 12 at 41.

17 In Liora Salter's view, this is also true of industry participants: intelligence gathering about competitors and informal coordination are often more important to industry participants than the content of particular standards. Liora Salter, "The Housework of Capitalism: Standardization in the Communications and Information Technology Sectors" (1993-94) 23 International Journal of Political Economy 105 at 116.

18 A recent report by the BC government, for example, found that the province's forest tenure system, in which government determines forestry planning requirements, harvest rates, and environmental protection standards, made it difficult for forestry companies to demonstrate the long-term commitment to sustainable management planning for a defined geographic forest area required for certification under the leading sustainable forestry management programs. British Columbia Ministry of Forests, *Implementing Forest Certification in British Columbia: Issues and Options — Report Summary* (March 2001), available at <http://www.for.gov.bc.ca/het/certification/researchproject.htm> (accessed 7 August 2001).

19 Such legitimation effects depend largely on the credibility of official pronouncements among relevant audiences, with off-hand, vague endorsements typically having much less effect on the use of voluntary initiatives by industry or consumers than deliberate pronouncements by well-informed officials who are capable of distinguishing genuine innovations from mere "business as usual" advances. See Carlo Carraro and François Lévêque, "Introduction: The Rationale and Potential of Voluntary Approaches," in Carraro and Lévêque, *supra* note 10 at 9-10.

20 Some federal government departments (for example, Environment Canada) and government officials in several provinces (for example, Alberta, British Columbia, Nova Scotia, and Ontario) have expressly encouraged private sector use of EMSs, often in very general terms in public remarks, websites, or pamphlets. Some have issued discussion papers or established modest government-industry partnerships around EMS implementation, but most of these efforts have been ad hoc and uncoordinated. More recently, federal officials participated in the development of a joint Canada-Mexico-US policy statement on EMSs. See North American Commission for Environmental Cooperation [hereinafter CEC], *Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems* (Montreal: CEC, 2000), available at <http://www.cec.org> (accessed 31 January 2003) (cautiously supporting use of EMSs to achieve public policy goals, endorsing structure and approach of leading EMS standards such as ISO 14001, setting out ten elements that voluntary EMSs should have to satisfy and enunciating governments' concerns about environmental performance, pollution prevention, public accountability, and legal compliance). Alberta and Ontario have begun to elaborate policies on the incorporation of an EMS into their regulatory frameworks. See the section entitled "Reward" later in this essay. Still, considering that EMSs have been in wide use for more than a decade, the paucity of considered policy statements is surprising.

21 Leon Gordenker and Thomas G. Weiss, "Pluralising Global Governance: Analytical Approaches and Dimensions" (1995) 16 Third World Quarterly 357; compare with Salter, *Mandated Science, supra* note 11 at 179.

22 *Standards Council of Canada Act*, R.S.C. 1985, c. S-16, as am. S.C. 1987, c. 1, S.C. 1996, c. 24. The Standards Council of Canada oversees Canada's National Standards System, an informal federation of more than 270 independent organizations. It delegates the actual writing of standards to accredited standards development bodies, such as the Canadian Standards Association [hereinafter CSA], a private not-for-profit corporation. For an excellent overview of standardization in Canada, see Canadian Institute for Environmental Law and Policy [hereinafter CIELAP], *CSA Environmental Standards Writing: Barriers to Environmental Non-Governmental Organizations Involvement* (Toronto: CIELAP, May 1997). Like the Standards Council of Canada, the majority of ISO national member bodies are state-owned, but the ISO member bodies in most advanced industrial democracies other than Canada are private not-for-profit organizations formally independent of the state.

23 *Standards Council of Canada Act, supra* note 22 at s. 4(1).

24 Salter's work on health, safety, and communication standards provides a detailed insight into this public–private hybridization inherent in standardization bodies. See, for example, Salter, *Mandated Science, supra* note 11, and Salter, "The Housework of Capitalism, *supra* note 17.

25 Federal government officials have been the most active, a few playing prominent roles in the development of the ISO 14000 standards. Provincial officials have also participated on a limited scale, and municipal officials have begun to participate in Canadian EMS standards committees.

26 In addition to participating in many non-governmental standards committees, governments have their own standards development organs. For example, one of the four standards development organizations accredited by the Standards Council of Canada, the Canadian General Standards Board [hereinafter CGSB], is a federal government organization within Public Works and Government Services Canada. Although the CGSB does not develop EMS standards, it provides EMS auditing and registration services to public and private sector clients.

27 See CSA, *Guideline B: Procedures for Establishing and Maintaining Standards Steering Committees*, 2nd edition (Toronto: CSA, 1989, revised 1990), reprinted in CIELAP, *supra* note 22 at Appendix C.

28 See, for example, Commissioner of the Environment and Sustainable Development [hereinafter CESD], *Report of the Commissioner of the Environment and Sustainable Development 1999* (Ottawa: Queen's Printer, 1999), available at <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c9menu_e.html> (accessed 1 April 2001).

29 See CIELAP, *supra* note 22.

30 See Standards Council of Canada, *Canadian Standards Strategy and Implementation Proposals* (Ottawa: Standards Council of Canada, March 2000), available at <http://www.scc.ca/> (accessed 31 January 2003). The strategy was the product of a stakeholder consultation process led by the Standards Council of Canada and Industry Canada.

31 The strategy is expressly based on two assumptions: that (1) standards are becoming a pillar of the new global trade system, and (2) fiscal restraint means that industry and government are struggling to do more with less, and standards can offer effective, less costly ways to achieve the objectives of reducing costs, eliminating regulatory burdens, and protecting the public interest. *Ibid.*

32 See, for example, Webb, *supra* note 14.

33 See Agreement on Technical Barriers to Trade, 1994, reprinted in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, Uruguay Round (1987-1994)* (Geneva: GATT Secretariat, 1994), arts. 3.1, 4.1, and Annex 3 [hereinafter TBT Agreement]. The TBT Agreement is also available at <http://www.wto.org/english/docs_e/

legal_e/legal_e.htm> (accessed 31 January 2003). See also the heading "Self-Discipline" later in this essay.

34 See, generally, Webb, *supra* note 14; and John Moffet and François Bregha, "Non-Regulatory Environmental Measures," in Gibson, *supra* note 7 at 15.

35 This category coincides roughly with Bruce Doern et al.'s "regulatory regime III," the state's regulation of itself. G. Bruce Doern et al., "Canadian Regulatory Institutions: Converging and Colliding Regimes," in G. Bruce Doern et al., eds., *Changing the Rules: Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999), 3.

36 See, for example, CESD, *supra* note 28.

37 The CESD has said that he expects to see "accelerated development" of EMSs in the current round of sustainable development strategies. CESD, "Moving Up the Learning Curve: The Second Generation of Sustainable Development Strategies" (undated), available at <http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/c9dec_e.html> (accessed 1 May 2001). Environment Canada has produced an EMS Self-Assessment Guide for federal organizations and has said that individual federal departments and agencies "are to develop and implement formal environmental management systems." Environment Canada, *Directions on Greening Government Operations* (undated), available at <http://www.sdinfo.gc.ca/SDinfo/ENG/docs/ggo/default.cfm> (accessed 30 April 2001). Nonetheless, EMSs have not expressly been made legally mandatory for federal organizations in Canada, in contrast to the United States where all federal facilities must implement EMSs by 2005. See *Greening the Government through Leadership in Environmental Management*, Executive Order no. 13148, 65 Fed. Reg. 24593 (21 April 2000). The new *Canadian Environmental Protection Act* authorizes regulations respecting the establishment of environmental management systems for federal government operations, but none have yet been promulgated. *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 209(1)(a) [hereinafter *CEPA 1999*].

38 As Agriculture and Agri-Food Canada expresses it, the federal government, as the single largest organization in Canada and the largest employer, purchaser, and landlord, can set an excellent example for Canada by implementing EMSs. Agriculture and Agri-Food Canada, *Agriculture in Harmony with Nature II: AAFC's Sustainable Development Strategy 2001-2004*, Publication 2074/E (Ottawa: Public Works and Government Services Canada, 2001) at 43, available at <http://www.agr.ca/policy/environment/eb/public_html/pdfs/sds/SDSII_en.pdf> (accessed 24 April 2001).

39 See, for example, the Sigma Project in the United Kingdom, "Sustainability – Integrated Guidelines for Management," available at <http://www.projectsigma.com> (accessed 31 January 2003), and the Multi-State Working Group on Environmental Management Systems in the United States, available at <http://www.dep.state.pa.us/dep/deputate/pollprev/mswg/mswg.htm> (accessed 31 January 2003).

40 See, for example, CESD, "Moving Up the Learning Curve," *supra* note 37; Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Office of the Auditor General of Canada, October 1995), ch. 11, Environmental Management Systems: A Principle-based Approach," available at <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9511ce.html> (accessed 1 May 2001) (observing that federal organizations are far behind the private sector in EMS implementation).

41 TBT Agreement, *supra* note 33 at art. 2.4. It is not clear whether regulations relating to EMSs would come within the definition of "technical regulations."

42 Indeed, Canada has been among the most aggressive states in enforcing these disciplines against its trading partners, for instance, successfully challenging the European Communities' ban on hormone-fed beef as an unjustified deviation from international food safety standards. See *EC - Measures Affecting Meat and Meat Products (Hormones)*, Report of the Appellate Body, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 February 1998). More recently, however, the WTO Appellate Body rejected Canada's challenge to a French ban on chrysotile asbestos, holding that the ban was a "technical regulation" within the meaning of the TBT Agreement but holding (for the first time in the history of the General Agreement on Tariffs and Trade [hereinafter GATT], that it was justified under the public health exception of Article XX of the GATT. See *EC - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WTO Doc. WT/DS135/AB/R (12 March 2001).

43 See note 64 later in this essay as well as the text connected with it.

44 See, generally, David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 1998) at 1407.

45 Probably the most ambitious empirical study of EMS implementation and performance is the ISO 14001 Pilots project sponsored by the US Environmental Protection Agency [hereinafter EPA] and conducted by researchers from the Environmental Law Institute and the University of North Carolina. Information on the project can be found online at <http://www.eli.org/isopilots.htm>.

46 As to the latter, Industry Canada hosts the Voluntary Codes Research Forum, a leading arena for informal exchange of information about research into voluntary corporate codes, generally with frequent attention to standardization and EMS-related issues. The forum consists of a website and a listserv facilitated by Kernaghan Webb, Senior Legal Policy Advisor and Chief of Research, Canadian Office of Consumer Affairs, Industry Canada. The forum can be found online at <http://strategis.ic.gc.ca/SSG/ca00973e.html>.

47 See the discussion of official policy pronouncements under the heading "Steering" earlier in this essay.

48 *Ibid.*

49 See, for example, Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law" (1997) 21 Harvard Envtl L. Rev. 537.

50 These programs also often provide other kinds of incentives, including subsidies, technical assistance, and reputational benefits (for example, official government recognition, eligibility for awards, and the privilege to display logos or other indicia of participation). The most prominent examples are probably the US EPA's National Environmental Performance Track and the Netherlands' framework licence system.

51 See Alberta Environment, *LEAD Program Guide – A Guide to Alberta Environment's Leaders Environmental Approval Document (LEAD) Program: Pilot Phase* (April 2001), available at <http://www.gov.ab.ca/env/protenf/publications/LEADProgramGuideApr01.pdf> (accessed 17 July 2001).

52 In contrast to most EMS-based regulatory relief programs, which either require a mature, third-party certified EMS or an EMS that goes significantly beyond the requirements of ISO 14001, the Leaders Environmental Approval Document [hereinafter LEAD] program requires only a loosely defined "basic" EMS that need not be fully developed, need not have all the elements of an ISO 14001 EMS, and need not be verified by an independent third party. Alberta Environment is, however, considering a "tiered" program in which upper tier participants must have an ISO 14001-equivalent, independently audited EMS. *Ibid.*

53 Ontario is seriously considering regulatory incentives for EMS implementation in its Co-operative Agreements program, which is currently under development. As to other governments, it is possible, for instance, that Environment Canada could couple EMSs with regulatory incentives in pollution prevention plans authorized under the new *CEPA*. *CEPA 1999*, *supra* note 37 at s. 56.

54 See, for example, Ontario Ministry of the Environment, Environmental Partnerships Branch, *Progress Report 2001: Ontario Initiatives in Pollution Prevention* (Toronto: Queen's Printer, 2001); Draft Memorandum of Understanding between the Governments of Canada, Ontario and Alberta and the Canadian Chemical Producers' Association on Environmental Protection through Action under CCPA Responsible Care, which is available at <http://www.ec.gc.ca/nopp/chemical/ccpa/indexe.htm> (accessed 30 October 2001).

55 Environment Canada's new Compliance and Enforcement Policy, for instance, makes no mention of EMSs at all, although it does recognize the "power and effectiveness of environmental audits as a management tool" and encourages their use. Environment Canada, *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999* (Ottawa: Environment Canada, 2001), available at <http://www.ec.gc.ca/enforce/homepage/cepa/CEPA99_final_eng.pdf.pdf> (accessed 4 July 2001).

56 For example, the new *CEPA* is the first legislation in Canada to expressly authorize a sentencing court to take the presence of an EMS into account as a mitigating factor in sentencing. *CEPA 1999*, *supra* note 37 at s. 287(c).

57 Between 1994 and 2000, the province of Nova Scotia offered a corporate income tax credit to assist Nova Scotia companies with the costs of achieving ISO 9000 or 14001 certification.

The credit was 25 percent of eligible expenditures, which included audits, registrar fees, training, and documentation. Very few companies claimed this tax credit for ISO 14001 certification expenses, reportedly because the provincial government failed adequately to bring it to the industries' attention (personal communication).

58 No Canadian government appears to have made EMSs a formal procurement consideration or requirement, although the federal government encourages government buyers to purchase from firms that are ISO 14001 certified. Public Works and Government Services Canada, "ISO 14001 – A New Tool for Buying Green," <http://contractscanada.gc.ca/sl/en/iso14-e.htm> (20 March 2001). Some government entities in Japan and Switzerland reportedly give formal preference to suppliers with EMSs. Laura E. Berón, "ISO 14000 and Trade Implications: Facts and Trends," paper presented at the Seminar on Trade, Environment and the ISO 14000 Series, ninth Annual Meeting of the ISO/TC 207, Kuala Lumpur, Malaysia, 4 July 2001 (copy on file with author). The US EPA is considering preferential government procurement treatment of products manufactured at facilities participating in the Performance Track program. US EPA, *Summary of EPA's Performance Track Proposal* (9 March 2000) (copy on file with author). The US Departments of Defense and Energy reportedly require first- and second-level suppliers to be ISO 14001 certified. Stenzel, *supra* note 12 at 270.

59 Although this situation is still a long way off, the trend toward requiring EMSs can be expected to continue in private sector procurement (see *supra* note 5 and accompanying text) and spread to public sector purchasing as well.

60 See, for example, *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, s. 220(1); *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 190. The *CEPA* expressly authorizes a sentencing court to direct an offender to "implement an environmental management system that meets a recognized Canadian or international standard," but no orders appear to have been made under this new provision. *CEPA* 1999, *supra* note 37 at s. 291(1). Although Ontario pioneered creative sentencing in Canada, the Harris Conservative government has ordered provincial prosecutors not to use it. Saxe, *supra* note 12 at 29. Two pillars of neoliberal politics appear to be in tension. On the one hand, an agenda of flexible regulation in which voluntary initiatives are encouraged and proposed regulations are subject to cost-benefit analysis and, on the other hand, an agenda of "zero tolerance" laws and tougher penalties that seldom seem to be subjected to the same cost-benefit disciplines.

61 *R.* v. *Prospec Chemicals Ltd.* (1996), 19 C.E.L.R. (N.S.) 178 (Alta. Prov. Ct.) (ordering a chemical company that was already a member of the chemical industry's voluntary Responsible Care program to implement a third-party certified ISO 14001 EMS); *R.* v. *Van Waters and Rogers Ltd.* (1998), 220 A.R. 315 (Prov. Ct.) (ordering a chemical company to undergo independent environmental compliance and ISO 14001 EMS audits, upgrade its EMS manual and operational controls, establish procedures for ongoing evaluation of conformance to ISO 14001, and present an EMS workshop to industry peers, but not ordering ISO 14001 certification); *R.* v. *Calgary (City)* (2000), 272 A.R. 161, 35 C.E.L.R. (N.S.) 253 (Prov. Ct.) (ordering city to obtain ISO 14001 certification for two of its water treatment plants by 2003 and declaring that an ISO 14001 EMS was "far in excess of what the present law and regulations require of a municipality"). Saxe discusses these cases and also mentions a fourth unreported decision, *R.* v. *Prototype Circuits Inc.* (ordering circuit board manufacturer to establish an EMS leading to ISO 14000 certification). Saxe, *supra* note 12. Finally, in another case, the court ordered the federal government to fund a tribal council's development of an EMS: *R.* v. *Canada (Minister of Indian Affairs)*, [2000] O.J. 5076 (Ont. S.C.J.) (Quicklaw) (ordering Department of Indian Affairs to pay $200,000 to support tribal council's development of a pollution prevention and environmental management system program for fuel storage tanks).

62 Saxe, *supra* note 12 at 26.

63 Governments in Brazil, the Caribbean, Zimbabwe, and elsewhere have reportedly considered or enacted legislation requiring all firms in sectors such as forestry or cruise shipping to implement EMSs, and some developing countries have reportedly considered requiring all firms to implement EMSs as an easy fix for inadequate or under-enforced environmental regulation. See, for example, Meidinger, *supra* note 13 at 10166; Saxe, *supra* note 12 at 30; and Stenzel, *supra* note 12 at 276. The European Union recently considered, but rejected, the idea of making its voluntary EMS initiative, the Eco-Management and Audit Scheme, mandatory.

64 See *Pipeline Regulations*, N.S. Reg. 66/98, s. 19(1) (requiring pipeline companies to establish an EMS to the ISO 14000 standard or equivalent); *Gas Pipeline Regulation*, N.B. Reg. 99-61, s. 46 (requiring all gas distributors to develop and implement an EMS); and *Gas Distribution and Marketers' Filing Regulation* N.B. Reg. 99-60, s. 7(12) (requiring all gas distributors applying for a permit for a gas pipeline that will affect a "sensitive feature" to develop an EMS that meets the requirements of ISO 14000 or a similar standard). Neither province requires companies to have their EMSs certified by a third party.

65 Saxe, *supra* note 12 at 38.

66 See Alberta Environment, *supra* note 51 at 7, and Appendix B. In addition, at least one licensing authority has expressly relied on a regulated entity's plans to obtain ISO 14001 certification as a basis for issuing an environmental approval. *Re Material Resource Recovery SRBP Inc.*, Doc. no. EP-97-04 (Ont. Envtl. Assessment Bd., 21 January 1998) (approving hazardous waste facility partly in reliance on applicant's plan to apply for ISO 14001 certification). The decision is discussed in Saxe, *supra* note 12 at 30.

67 See Salter, *Mandated Science*, *supra* note 11 at 25. The CSA estimates that approximately one-third of its standards have been referred to in provincial and federal laws. CSA, "Association Activities," in *ISO 14001: 1996*, *supra* note 1 (back matter). Saxe reports that the term "CSA" is mentioned 233 times in Ontario statutes and regulations alone, 170 of these mentions being in building code regulations. Saxe, *supra* note 12 at 37. See also Robert W. Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health" (1978) 56 Tex. L. Rev. 1329, for an account of the use of voluntary standards in the development of US health and safety regulations.

68 For example, the Canadian Electrical Association has announced that all of its members must have an ISO 14001 or equivalent EMS in place by a certain date; the US-based International Council of Cruise Lines recently announced that it will make EMS implementation a mandatory membership condition in an effort to preempt tougher government regulation and reduce adverse attention to chronic marine pollution; the Canadian Chemical Producers' Association requires its members to implement the Responsible Care program; and numerous other industry associations in Canada and around the world require their members either to subscribe or verifiably demonstrate conformance to various environmental principles or codes of conduct. Courts have held that industry associations may use contract-based actions to discipline members for failure to meet agreed-upon voluntary standards. Webb, *supra* note 14 at 38. Adherence to voluntary initiatives could also be made a term of insurance or finance contracts, although I know of no such contracts involving an EMS.

69 Webb, *supra* note 14; and Meidinger, *supra* note 13.

70 See, for example, Webb, *supra* note 14 at 38-39. Webb has also made this argument in postings to the Voluntary Codes Research Forum listserv (see *supra* note 46). In addition to contract law, voluntary initiatives may also be enforced through property or trust law in certain circumstances. See Meidinger, *supra* note 13.

71 The term "benchmarking" is often used to describe a technique used by organizations to study "best practices" in other organizations or industries in order to assess and improve their own practices. I do not use the term in this sense but in the sense of an external adjudicator judging an organization's conduct against a chosen standard of care.

72 See, for example, Webb, *supra* note 14; Meidinger, *supra* note 13; and Saxe, *supra* note 12. In tort actions, voluntary initiatives may be used to determine "reasonable use" of land in a nuisance action or, more commonly, "reasonable care" in a negligence action. See, for example, *Visp Constr.* v. *Scepter Mfg.* (1991), 45 Constr. L. Rep. 170 (Ont. Gen. Div.) (defendant in product liability action not negligent because its manufacturing process conformed to voluntary CSA standard, CSA standard was reasonable notwithstanding that CSA was made up largely of manufacturers' representatives and that higher standards allegedly existed, and defendant took reasonable care to assure its product met the CSA standard particularly by maintaining CSA certification of its products and manufacturing process).

73 In Canada, a defendant will not be found guilty of a strict liability offence, which includes most environmental regulatory offences, if the person establishes that he or she exercised "due diligence" – that is, did everything reasonable in the circumstances to avoid committing the offence. See *R.* v. *Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353; and Elaine L. Hughes, "The Reasonable Care Defences" (1992) 2 J. Envtl. L. and Practice 214. Due diligence is essentially equivalent to the civil negligence standard. In both civil and regulatory cases, conformance to industry custom is usually strong evidence of reasonableness unless the custom itself is unreasonable or the defendant's particular circumstances require more.

74 See, for example, Saxe, *supra* note 12 at 21; Taylor, "ISO 14000 and Environmental Regulation," *supra* note 12 at 20; Taylor, "Is ISO 14001 Standardization in Tune with Sustainable Development?" *supra* note 12 at 530-31; CESD, *supra* note 28 at para. 1.45 (declaring ISO 14001 to be the standard of due diligence). In fact, demonstrating "due diligence" and thereby avoiding regulatory liability appears to be one of the leading motivations for public sector organizations to implement EMSs, as Canadian public authorities face more frequent environmental prosecutions and increasingly severe penalties if convicted.

75 Webb, *supra* note 14 at 32 and 40.

76 *Ibid.* at 35-36.

77 Nikolas Rose, *Powers of Freedom* (Cambridge: Cambridge University Press, 1999) at 18.

78 Nikolas Rose and Peter Miller, "Political Power beyond the State: Problematics of Government" (1992) 43 British Journal of Sociology 173 at 174.

79 Compare with David Kennedy, "Thinking against the Box: When Renewal Repeats" (2000) 32 N.Y.U. J. Int'l L. and Pol. 335 (describing similar dynamics of intellectual renewal in the field of international law).

80 See Michel Foucault, *The History of Sexuality*, vol. 1: *Introduction* (London: Allen Lane, 1978) 88-89 (remarking that two centuries after the political revolutions that overthrew the absolutist monarchies of Europe, in the field of political thought, we have not yet cut off the king's head).

81 Rose and Miller, *supra* note 78 at 174-75.

82 Michel Foucault, "Governmentality," in Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect* (Chicago: Chicago University Press, 1991), 87 at 103.

83 In this conception, government includes the government of the state, the government of others and the government of oneself. See generally Foucault, "Governmentality," *supra* note 82; Burchell, Gordon, and Miller, *supra* note 82; Rose and Miller, *supra* note 78; Rose, *supra* note 77; Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999); and Paul Rutherford, "The Entry of Life into History," in Éric Darier, ed., *Discourses of the Environment* (Oxford: Blackwell, 1999), 37.

84 Foucault, "Governmentality," *supra* note 82.

85 Rose and Miller, *supra* note 78 at 175.

86 *Ibid.*

87 This idea of "action at a distance" has been used quite effectively by some proponents of "regulatory reinvention." See, for example, Gunningham and Grabosky, *supra* note 9 at 10 and 123-25; Peter N. Grabosky, "Using Non-Governmental Resources to Foster Regulatory Compliance" (1995) 8 Governance 527.

88 Rose and Miller, *supra* note 78 at 187.

89 The power of expertise has been recognized in numerous other contexts, from the crucial role of experts in policy networks (see, for example, M.M. Atkinson and W.D. Coleman, "Policy Networks, Policy Communities, and the Problems of Governance," in L. Dobuzinskis, M. Howlett, and D. Laycock, eds., *Policy Studies in Canada: The State of the Art* [Toronto: University of Toronto Press, 1996] at 193) to the influence of "epistemic communities" in international environmental politics (see, for example, Peter M. Haas, *Saving the Mediterranean* (New York: Columbia University Press, 1990); and the Special Issue on Epistemic Communities and International Policy Coordination (1992) 46 International Organization 1).

90 See, for example, Nikolas Rose and Mariana Valverde, "Governed By Law?" (1998) 7 Social and Legal Studies 541; Alan Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto, 1994); and Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993).

91 See, for example, Darier, *supra* note 83.

92 Compare with Salter, "Housework of Capitalism," *supra* note 17 at 106 (commenting on standardization generally).

93 Compare with *ibid.* at 109-10.

94 Compare with Cutler, Haufler, and Porter, *supra* note 8 (identifying and analyzing interfirm regulation as one of the principal expressions of private authority in international affairs).

95 While "continual improvement" is usually understood in the environmental policy community as meaning continual improvement of environmental performance, ISO 14001 and 14004 define it as the "process of enhancing the environmental management system to achieve improvements in overall environmental performance" and emphasize that the rate and extent of improvement in environmental performance are up to the organization to determine and will not necessarily follow simply from the establishment and operation of an EMS. See, for example, ISO 14001, *supra* note 1 at clauses 3.1 and A.1.

96 For an account of the "stakeholder management" approach to corporate social responsibility and a proposal for an alternative "rights"-based approach, see Richard Boele, Heike Fabig, and David Wheeler, "Shell, Nigeria and the Ogoni: A Study in Unsustainable Development? Part II – Corporate Social Responsibility and 'Stakeholder Management' versus a Rights-Based Approach to Sustainable Development" (2001) 9(3) Sustainable Development 121-35.

97 For example, ISO 14001 and 14004 provide frameworks for identifying and documenting applicable legal requirements, setting objectives and targets for them, monitoring, measuring, and reviewing their achievement, and taking corrective action when non-compliance is discovered.

98 Compare with Salter, "Housework of Capitalism," *supra* note 17 at 113 (commenting on standardization generally). As Salter explains, this tendency does not reflect a desire to disguise the dominant role played by industry in standardization, but simply to deny that this role is political.

99 This fact may help explain the growing use of EMSs by government departments and might justify the inference that the EMS is a mechanism by which multinational corporations and other large private organizations, such as standardization bodies, are redrawing the lines between public and private in informal alliances with large public organizations.

100 See, for example, ISO, *ISO's Long-Range Strategies 1999-2001: Raising Standards for the World* (Geneva: ISO, 1998). A summary of this document, entitled "ISO in the New Century," is available at <http://www.iso.ch/iso/en/prods-services/otherpubs/pdf/longrang.pdf> (accessed 30 October 2001) ("ISO develops only those standards that are required by the market. This work is carried out by experts on loan from the industrial, technical, and business sectors, which have asked for the standards and which subsequently put them to use").

101 Salter, "Housework of Capitalism," *supra* note 17 at 107.

102 Christopher Sheldon, "Introduction," in Christopher Sheldon, ed., *ISO 14001 and Beyond* (Sheffield, UK: Greenleaf, 1997), 11 at 11.

103 See, generally, Rose and Miller, *supra* note 78 at 196-201.

104 Garret Hardin, "The Tragedy of the Commons" 162 Science (13 December 1968) 1243 at 1245-46 ("*Quis custodiet ipsos custodes?*").

105 Accreditation refers to the designation of individuals or organizations as accredited to certify an organization or product's conformance to a voluntary standard. Accreditation of ISO 14001 certifiers is done by standards bodies themselves, and while there have been rumours about the inferior quality of some certifiers, particularly in the developing world, this is usually left to the market to sort out. There is very little oversight either of accreditation or accredited certifiers. Some coordination of accreditation is achieved through organizations such as the International Accreditation Forum and the International Social and Environmental Accreditation and Labelling Alliance. For more information on the latter, see Errol Meidinger, "Emerging Trans-Sectoral Regulatory Structures in Global Civil

Society: The Case of ISEAL (International Social and Environmental Accreditation and Labelling Alliance)," paper presented at the joint meetings of Law and Society Association and Research Committee for the Sociology of Law, 4-7 July 2001, Budapest, Hungary, <http://law.buffalo.edu/homepage/eemeid/scholarship/ISEAL.pdf> (1 August 2001).

106 The success of this expulsion is reflected in the fact that despite their major implications for environmental quality, public health, international competitiveness, and regulatory autonomy, voluntary EMS initiatives have received little attention from academics, almost none from news media and grassroots organizations, and have only recently begun to attract serious attention from public authorities.

107 To those familiar with international law or international relations, the very move to the term "governance" signals a multiple shift in political rationalities: a rejection of ineffective, formal, inflexible, hierarchical organizations in favour of pragmatic, effective, informal, organic, flexible "regimes" and networks and a move from inefficient, corrupt, centralized public administration to efficient, honest, liberal-democratic, rule-of-law, free-market, World-Bank-friendly "good governance." Exploring the implications of this move is beyond the scope of this essay.

108 Compare with Maarten Hajer, *The Politics of Environmental Discourse* (Oxford: Clarendon, 1995) at 60.

109 Compare with *ibid.* at 12-13, 58-68; and Dorte Salskov-Iversen, Hans Krause Hansen, and Sven Bislev, "Governmentality, Globalization and Local Practice: Transformations of a Hegemonic Discourse" (2000) 25 Alternatives: Social Transformation and Humane Governance 183.

110 See, for example, ISO Technical Committee 207 [hereinafter ISO/TC 207], "About ISO/TC 207" (undated), available at <http://www.tc207.org/abouttc207/aboutTC207_main.html>; Cary Coglianese and Jennifer Nash, "Environmental Management Systems and the New Policy Agenda," in Coglianese and Nash, *Regulating from the Inside, supra* note 12, 1 at 11.

111 See, for example, Sheldon, "Introduction," *supra* note 102 at 12; Joseph Cascio, "The ISO 14001 Standard," in Cascio, *supra* note 6, 24 at 25.

112 See, for example, Coglianese and Nash, *supra* note 110 at 12; Joseph Cascio, "Introduction," *supra* note 6 at 4; John D. Wolfe, "CSA's Environmental Management Program and Its Relationship to Other National and International Environmental Management Systems Initiatives," in Canadian Institute, *Environmental Management Systems: Preparing for the New Reality* (Toronto: Canadian Institute, 1992).

113 Cascio, "The ISO 14001 Standard," *supra* note 6 at 24-25.

114 See, for example, Coglianese and Nash, *supra* note 110 at 11; Oswald A. Dodds, "An Insight into the Development and Implementation of the International Environmental Management System ISO 14001," in Hillary, *supra* note 6, 27; Dick Hortensius and Mark Barthel, "An Introduction to the ISO 14000 Series," in Sheldon, *supra* note 102, 19; Gabriele Crognale, "Environmental Management at a Crossroads: Time for a Radical Breakthrough," in Gabriele Crognale, ed., *Environmental Management Strategies: The Twenty-First Century Perspective* (Upper Saddle River, NJ: Prentice Hall PTR, 1999) 2 at 2.

115 See, for example, John Wolfe, "Drivers for International Integrated Environmental Management," in Hillary, *supra* note 6, 15.

116 See, for example, Hortensius and Barthel, *supra* note 114 at 32.

117 See, for example, Reiley, *supra* note 12; Murray, *supra* note 12; Pezzoli, *supra* note 12; Stenzel, *supra* note 12; Lally, *supra* note 6; Crognale, *supra* note 114; Cascio, "Introduction," *supra* note 6; Coglianese and Nash, *supra* note 110 at 7-9.

118 See, for example, Sheldon, "Introduction," *supra* note 102 at 14.

119 See, for example, ISO/TC 207, *supra* note 110; Crognale, *supra* note 114 at 6; Cascio, "Introduction," *supra* note 6 at 4. The ISO's work on EMS standards, for instance, was explicitly initiated as one of the global business community's main contributions to sustainable development in the context of the 1992 Rio Earth Summit. ISO/TC 207, *supra* note 110; Hortensius and Barthel, *supra* note 114.

120 See, for example, Cascio, "Background and Development of ISO 14000 Series," in Cascio, *ISO 14000 Handbook, supra* note 6, 4 at 10.

121 See, generally, Hajer, *supra* note 108.

122 See, generally, Gunningham and Grabosky, *supra* note 9 at 5-19; Ayres and Braithwaite, *supra* note 9; and Osborne and Gaebler, *supra* note 9.

123 Gunningham and Grabosky, *supra* note 9 at 10-13.

124 Salskov-Iversen *et al.*, *supra* note 109.

125 Miguel De Larrinaga makes a similar argument regarding the discourse surrounding Shell's involvement in Nigeria. Miguel de Larrinaga, "(Re)Politicizing the Discourse: Globalization Is a S(h)ell Game," (2000) 25 Alternatives: Social Transformation and Humane Governance 145.

126 Compare Duncan Kennedy, "The Political Stakes in 'Merely Technical' Issues of Contract Law" (unpublished paper, 17 September 2000) (copy on file with author).

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